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No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
v.
STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

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Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO AND RHODE ISLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the States of California, Michigan, Nebraska, Ohio,

and Rhode Island, sovereign states of the United States of America, by and through the State Officials listed below and undersigned counsel, move the Court for an order permitting them to intervene as Plaintiffs in the above-entitled cause and permitting their proposed Complaint in Intervention, attached hereto, to be filed in this action. In support of this Motion, the States of California, Michigan, Nebraska, Ohio, and Rhode Island (hereinafter "Designated States") would show the Court as follows:

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"), held by securities brokerage houses incorporated in Delaware.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas claimed a right to possession of certain of the unclaimed property also claimed by New York and Delaware. Texas has introduced into this litigation the related issue of which state is entitled to claim and take possession of other intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations

("Additional Excess Receipts").[1]

4. As specifically and particularly set forth in the attached proposed Complaint in Intervention, the Designated States claim a portion of the Excess Receipts and the Additional Excess Receipts (collectively "Unclaimed Funds") which constitute the unclaimed property that is the subject matter of this controversy. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount").

5. The amount of Unclaimed Funds in issue in this litigation that the Designated States are entitled to claim is presently unknown, but, upon information and belief, is substantial.

6. The decision of the Court in this action will conclusively determine the right of the Designated States to claim and take possession of these Unclaimed Funds. If the position of either Delaware or New York or Texas is accepted, the Designated States may be forever precluded from taking possession of the unclaimed property as to which there are conflicting claims. Because Delaware, New York and the Designated States each asserts conflicting claims to the subject Unclaimed Funds, the interests of the Designated States are not adequately represented by the existing parties.

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1. These terms are defined in the accompanying Complaint in Intervention.

7. The Motion of the Designated States is timely because the litigation is still at an early stage. The Special Master issued an order effective October 18, 1989, providing that prospective intervenors filing motions for leave to intervene within thirty days of that date will join the same scheduling track as presently participating parties. Thus the proceedings will not be delayed by the granting of this motion.

8. The intervention of the Designated States will aid in the resolution of the factual and legal issues presented by this litigation.

9. The intervention of the Designated States will allow the various positions of the states to be resolved in a single proceeding, avoiding a multiplicity of lawsuits.

10. Based on the foregoing, and the arguments set forth in the attached Brief in support of this Motion, the Designated States are entitled to intervene as a matter of right pursuant to Rule 24(a)(2), or, in the alternative, in the exercise of the Court's discretion pursuant to Rule 24(b), Federal Rules of Civil Procedure.

THEREFORE, the Designated States request that they be permitted to intervene as party plaintiffs in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

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STATE OF TEXAS,
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Plaintiffs in Intervention.

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND

The states of California, Michigan, Nebraska, Ohio, and Rhode Island, Plaintiffs in Intervention, by and

through their Attorneys General, file this Complaint in Intervention through which they seek a judgment that New York pay to Plaintiffs in Intervention all Excess Receipts and Additional Excess Receipts attributable to commercial activities in their respective states, and that New York be enjoined from interfering with their right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts, and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ('Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property (the "Excess Receipts") held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and nonbrokerage firm intermediaries (the "Additional Excess Receipts").

5. Shortly thereafter, numerous other jurisdictions filed motions to intervene and on September 13, 1989, the Special Master filed with the Court the Report of the Special Master on Motions to Intervene in which he recommends that the various motions to intervene be granted.[1]

III. INTEREST AND CLAIM OF PLAINTIFFS IN INTERVENTION

6. Plaintiffs in Intervention are the States of California, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States").

7. The Designated States seek a determination of

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1. The Special Master recommended that the intervention motions of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah, Washington, Kentucky, Pennsylvania, the District of Columbia, Idaho, New Mexico, Tennessee, Virginia and Wisconsin be granted. On October 16, 1989 the Court ordered the Special Master's September 13, 1989 Report to be filed.

their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts" (collectively, "Unclaimed Funds") as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of certain unclaimed payments[2] of dividends, profits, principal, interest, and securities[3] representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the New York dormancy period, after which time they generally are demanded by and are remitted to New York without any determination by such firms that New York is the state of the last known address of the beneficial owner, resulting in an allocation among the states which is not in proportion to the commercial activities which gave rise to the unclaimed payments.

(b) "Additional Excess Receipts" consist of Distributions as described in (a) except that they (1) are presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as

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2. Including, but not limited to, reorganization, redemption, and maturity payments.

3. The term "security" is defined as it is in the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10).

banks and clearinghouses for the settlement of trades in securities, or (2) are unclaimed principal and interest payments on state and municipal obligations not otherwise included in (a) that are held either by brokerage or non-brokerage intermediaries.

8. The Unclaimed Funds claimed herein consist of unclaimed property (under each of the Designated States' relevant unclaimed property law) which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities giving rise to the Distributions, are received by holders who do not themselves have a claim to such funds and to whom the beneficial owners, if any, are unknown. Such holders are intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, which do not act on their own behalf, but receive, hold, and/or remit distributions on behalf of, or for the benefit of, others who have or have had an interest in the underlying security.

9. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount"). Such allocations are administratively feasible because relevant books and records are maintained in a form from which the pertinent information is readily ascertainable.

10. The Designated States assert their claims pursuant to their respective unclaimed property laws which provide for the escheat of abandoned or unclaimed tangible and intangible personal property when the owner of the property cannot be found by the holder of the property, and no claim to the property has been made within the applicable dormancy period.[4]

11. Upon information and belief, portions of the Unclaimed Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners or by other states with superior claims to the funds.

PRAYER FOR RELIEF

WHEREFORE, the Designated States pray:

1. That New York be restrained and enjoined from demanding or collecting such Unclaimed Funds, and from expending any such sums collected, but presently unencumbered and unspent, which are attributable to Unclaimed Funds being claimed by the Designated States

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4. See, California Code of Civil Procedure §§1500-1582; Michigan Code of Escheats, Act No. 329 of the Public Acts of 1947, as amended, Michigan Compiled Laws, §567.1 *et seq.*; Nebraska Revised Statutes, §69-1301 *et seq.* (Reissue 1986); Ohio, Rev. Code Ann. §169.01 *et seq;* Rhode Island, Gen. Laws, §33-21-11, *et seq.*

through this action, and that all such Unclaimed Funds be segregated and turned over to the custody of the Special Master until such time as this controversy is resolved;

2. That judgment be entered declaring that, in the circumstances described herein, if the addresses of the beneficial owners are unknown, the Allocated Amount of Unclaimed Funds held by brokerage firms and other intermediaries attributable to corporate and governmental issuers is subject to the claim of each state where the commercial activities occurred which gave rise to the Unclaimed Funds;

3. That computation of an Allocated Amount in accordance with such judgment be deemed for all purposes as, and be accepted as satisfying any state demands for, a report or allocation in accordance with the last known address of the person entitled to such property on the books and records of the holder;

4. That New York be directed to account for, and pay or deliver to each of the Designated States, the respective Allocated Amounts of all Unclaimed Funds it has received and may receive, where the addresses of the beneficial owners of the Unclaimed Funds are unknown, and the Funds are deemed abandoned pursuant to the applicable dormancy period under each such Designated State's unclaimed property law;

5. That a reasonable fund be created from Unclaimed Funds presently being held by New York to cover the compensation of the Special Master, his

technical, stenographic, and clerical assistants, the cost of printing his reports to this Court, the retention of experts to advise the Special Master as he deems necessary and appropriate and for all other proper expenses. Such funds may be credited against any interest adjudged owing with respect to such Unclaimed Funds.

6. Such other and further relief as this Court deems just and proper.,

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November 17, 1989

EXHIBIT A TO COMPLAINT IN INTERVENTION

UNCLAIMED PROPERTY AND ESCHEAT LAWS OF THE DESIGNATED STATES

CALIFORNIA—*Code of Civil Procedure §§1500-1582*

MICHIGAN—*Code of Escheats, Act No. 329 of the Public Acts of 1947, as amended, Michigan Compiled Laws, §567.1 et seq.*

NEBRASKA—*Nebraska Revised Statutes §69-1301 et seq. (Reissue 1986).*

OHIO—*Ohio, Rev. Code Ann. §169.01 et seq.*

RHODE ISLAND—*Rhode Island, Gen. Laws, §33-21-11, et seq.*

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Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

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BRIEF OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the State of New York ("New York") as to which state is entitled to

claim and take possession of certain unclaimed intangible personal property. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention, asserting claims to portions of the same unclaimed property and similar types of property. The States of California, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States") seek leave to intervene so that they may assert their claims to portions of this unclaimed property to which they are entitled.

STATEMENT OF THE CASE

This original action concerns certain intangible property generated by securities transactions and by the payments of dividends, interest and principal in cases where the address of the rightful owner of the intangible property is unknown. New York, Delaware and Texas have asserted rights to the property based upon conflicting theories.

The accompanying Complaint in Intervention fully sets forth the entitlement of the Designated States to the unclaimed property at issue referred to as "Excess Receipts" and "Additional Excess Receipts"[1/] collectively referred as "Unclaimed Funds". These Unclaimed Funds consist of Distributions received by brokerage firms. When there is no known owner entitled to claim these

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1. These terms are defined in the accompanying Complaint In Intervention.

Distributions they remain in "Suspense Accounts" at the brokerage firm for three years, and thereafter are currently being remitted to New York.

Delaware, New York, and Texas purport to base their respective claims on the rulings of this Court in *Texas v. New Jersey*, 379 U. S. 674 (1965) and *Pennsylvania v. New York*, 407 U. S. 206 (1972). These cases held that unclaimed property may be escheated by the state of the last known address of its owner, and if that address is unknown, to the state of incorporation of the debtor. The Court said that disputes of this nature by states over escheatable property should be determined primarily on principles of "fairness" and ease of administration. Further, the Court said that distribution to the claimant states "in proportion to the commercial activities of their residents" could accomplish both purposes. *Texas v. New Jersey, supra*, 379 U. S. at 681.

Delaware argues that certain Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firms holding such funds[2/] since the identities of the Beneficial Owners of the Excess Receipts are unknown. New York contends that the Excess Receipts should be returned to that state, for the reason that the Excess Receipts are owed to other brokerage firms whose "trading addresses" are in New

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2. Delaware limits its complaint to brokerage firms incorporated in Delaware, since its theory encompasses only such firms. The Complaint of the Designated States is not so restricted.

York. Texas says that the Excess Receipts should be remitted to the state of incorporation of the issuer when a last known address of the true beneficial owner is unavailable because the Excess Receipts constitute a debt of the Issuer. The Designated States also claim a portion of these same Excess Receipts under the holdings of this Court in *Texas v. New Jersey, supra*, and *Pennsylvania v. New York, supra*, but believe that proper application of those precedents in these circumstances should result in distribution of a substantial portion of the funds at issue to the Designated States rather than to Delaware, Texas, or New York. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities or government debt instruments and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount").[3/] These claims are asserted pursuant to each state's unclaimed property law, the relevant portions of which are

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3. The State of the relevant commercial activity is the state:

•of the last known address of the last known beneficial owner (as it appears on the books and records of the holder, or of any intermediary acting for such holder or owner) of the underlying security, except that

• such address may be presumed to be the state of the local branch, office, or agency at which such owner purchased the security or maintained the account containing the security.

cited in Exhibit A to the proposed Complaint in Intervention.

ARGUMENT

I

APPLICANTS MEET THE REQUIREMENTS FOR INTERVENTION

Intervention is proper because the Designated States have satisfied the requirements for intervention set forth in Rule 24(a)(2) of the Federal Rules of Civil Procedure[4] as incorporated in Sup. Ct. R. 9.2,[5] and are therefore entitled to intervene as a matter of right. The

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4. Pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., anyone who timely applies shall be permitted to intervene in the action:

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

5. Rule 9.2 of the Supreme Court directs that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions."

disposition of this action is likely, as a practical matter, to impair the ability of the Designated States to protect their interests in the disputed property in the absence of their intervention as plaintiffs.

By this intervention, the Designated States claim a portion of the specific unclaimed property which constitutes the subject matter of this action. While the precise amount of the unclaimed property claimed by the Designated States is presently unknown, on information and belief, the amount is substantial.

The State of Texas has been permitted to intervene in the instant case, and the Special Master appointed by this Court has stated his intention to recommend that motions of all states seeking to intervene in a timely manner be granted. *See, Report of the Special Master on Motions for Intervention, September 13, 1989; Litigation Management Order No. 1, October 18, 1989, as amended.*

Because their laws are not identical to those of the other states and because they are asserting a position distinct from those of Delaware, New York and Texas, the Designated States have interests that are not adequately represented by existing parties. In fact, the absence of the Designated States from this litigation might bar them from asserting claims to property to which they might otherwise be entitled. The Designated States should therefore be permitted to intervene as a matter of right.

Alternatively, the Designated States should be permitted to intervene pursuant to Rule 24(b), Federal

Rules of Civil Procedure as a matter of discretion.[6/] Permissive intervention is appropriate because, without the intervention of the Designated States, matters involving issues of fact and law common to those presently in this lawsuit, and involving potentially hundreds of millions of dollars, will of necessity be decided for the Designated States by implication and without a complete presentation of their points of view on the issues. Additionally, the facts which the Designated States will rely upon in order to support their claim are either already before the Court or will inevitably be developed during the course of these proceedings. Clearly, the claims of the Designated States to the unclaimed property at issue involve questions of law and fact common to those already present in this litigation.

Intervention by the Designated States' motion is timely in light of the October 18, 1989, ruling of the Special Master that prospective intervenors filing motions for leave to intervene within thirty days of that date will join the same scheduling track as presently participating parties. *Litigation Order No. 1, supra.* Thus, the proceedings will not be delayed by the granting of this motion.

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6. Pursuant to Rule 24(b), Fed. R. Civ. Pro., the Court may exercise its discretion and allow permissive intervention if an applicant's claim involves issues of fact or law common to those already present in the litigation and the intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties.

II

THIS COURT'S PRECEDENTS CALL FOR INTERVENTION IN THESE CIRCUMSTANCES

Intervention is proper under the principles established in *Western Union Telegraph Co. v. Pennsylvania*, 368 U. S. 71 (1961). In that case, the Court recognized the difficulties inherent in resolving controversies among different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id. at 79. See also, *Pennsylvania v. New York, supra; Texas v. New Jersey, supra* (both allowing intervention of additional states in unclaimed property cases). The Designated States seek by this Intervention an opportunity to so present their claims.

CONCLUSION

For the reasons stated, the Motion of the Designated States for Leave to Intervene as Plaintiffs should be granted.

Respectfully submitted,

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November 17, 1989

PROOF OF SERVICE

I, YEORYIOS C. APALLAS, certify that I am counsel of record for Plaintiff in Intervention, the State of California, that I am a member of the Bar of the Supreme Court of the United States, and that on the 16th day of November, 1989, I served copies of the foregoing Motion for Leave to File Complaint in Intervention, Complaint in Intervention, and Brief in Support of Motion for Leave to File Complaint in Intervention, on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

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